United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

74-2038

To be argued by
Stanley H. Fischer

United States Court of Appeals

For the Second Circuit.

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

against

ARAMIS FERNANDEZ

Defendant-Appellant.

BRIEF FOR APPELLANT

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STATUTES

Section 841. Prohibited acts A-Unlawful Acts

(a) Except as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally --

(1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance;

Section 841

(b) Except as otherwise provided in section 845 of this title, any person who violates subsection (a) of this section shall be sentenced as follows:

(1) (A) In the case of a controlled substance in schedule 1 or 11 which is a narcotic drug, such person shall be sentenced to a term of imprisonment of not more than 15 years, a fine of not more than $25,000, or both. If any person commits sucy a violation after one or more prior convictions of him for an offense punishable under this paragraph, or for a felony under any other provision of this subchapter or subchapter 11 of this chapter or other law of the United States relating to narcotic drugs, marihuana, or depressant or stimulant substances, have become final, such person shall be sentenced to a term of imprisonment of not more than 30 years, a fine of not more than $50,000, or both. Any sentence imposing a term of imprisonment under this paragraph shall, in the absence of such a prior conviction, impose a special parole term of at least 3 years in addition to such term of imprisonment and shall, if there was such a prior conviction, impose a special parole term of at least 6 years in addition to such term of imprisonment.

Section 846. Attempt and conspiracy

Any person who attempts or conspires to commit any offense defined in this subchapter is punishable by inprisonmentor fine or both which may not exceed the maximum punishment prescribed for the offense, the commission of which was the object of the attempt or conspiracy.

Section 1202.

(a) Persons liable; penalties for violation.

Any person who--

(1) has been convicted by a court of the United States or of a State or any political subdivision thereof of a felony...and who receives, possesses, or transports in commerce or affecting commerce, after the date of enactment of this Act, any firearm shall be fined not more than $10,000 or imprisoned for not more than two years, or both.

(c) Definitions.

As used in this title--

(1) "commerce" means travel, trade, traffic, commerce, transportation, or communication among the several States, or between the District of Columbia and any State, or between any foreign country or any territory or possession and any State or the District of Columbia, or between points in the same State by through any other State or the District of Columbia or a foreign country;

(2) "felony" means any offense punishable by imprisonment for a term exceeding one year, but does not include any offense (other than one involving a firearm or explosive) classified as a misdemeanor under the laws of a State and punishable by a term of imprisonment of two years or less;

(3) "firearm" means any weapon (including a starter gun) which will or is designed to or may readily be converted to expel a projectile by the action of an explosive; the frame or receiver of any such weapon; or any firearm muffler or firearm silencer; or any destructive device. Such term shall include any handgun, rifle, or shotgun;

(4) "destructive device" means any explosive, incendiary, or poison gas bomb, grenade, mine, rocket, missile, or similar device; and includes any type of weapon which will or is designed to or may readily be converted to expel a projectile by the action of any explosive and having any barrel with a bore of one-half inch or more in

diameter;

(5 (5) "handgun" means any pistol or revolver originally designed to be fired by the use of a single hand and which is designed to fire or capable of firing fixed cartridge ammunition, or any other firearm originally designed to be fired by the use of a single hand;

(6) "shotgun" means a weapon designed or redesigned, made or remade, and intended to be fired from the shoulder and designed or redesigned and made or remade to use the energy of the explosive in a fixed shotgun shell to fire through a smooth bore either a number of ball shot or a single projectile for each single pull of the trigger;

(7) "rifle" means a weapon designed or redesigned, made or remade, and intended to be fired from the shoulder and designed or redesigned and made or remade to use the energy of the explosive in a fixed metallic cartridge to fire only a single projectile through a rifled bore for each single pull of the trigger.

CASES CITED

Berger v. United States
295 US 78, 79 L.Ed. 1314, 55 S.Ct. 629

Daily v. United States
282 F2d 818 (9th Cir. 1960)

United States v. Aviles
274 F2d 179

United States v. Carter
320 F2d (2nd Cir. 1963)

United States v. Douglas
319 F2d 2 Ct. 526 (2nd Cir. 1963)

U.S. v. Fibre
425 F2d 107 (2nd Cir. 1970) cert. denied 400 US 849

U.S. v. Hysokion
448 F2d 343 (2nd Cir. 1971)

U.S. v. Hernandez
290 F2d 96 (2nd Cir. 1961)

U.S. v. Jones
308 F2d 26 (2nd Cir. 1962)

U.S. v. Koch
113 F2d 182

U.S. v. Kotteakos
328 US 750, 90 L.Ed. 1557,66 S. Cr. 1239

U.S. v. Lopez
355 F2d 250 (2nd Cir. 1960)

U.S. v. Ramis
315 F2d 437 (2nd Cir. 1963)

U.S. v. Reine
242 F2d 302

U.S. v. Rivera
346 F2d 942 (2nd Cir. 1966)

U.S. v. Steward
451 F2d 1203 (2nd Cir. 1971)

U.S. v. Stromberg
268 F2d 256

ISSUES

1. Was the introduction into evidence of proof of a separate conspiracy charged in a separate indictment improper and a fatal variance?

2. Did the court err in permitting into evidence an exhibit unrelated to any charges and marred by a five day breach in its chain of custody?

3. Was defendant Fernandez shown to be a co-conspirator?

4. Did the government fail to prove Counts III and IV as a matter of law?

STATEMENT OF THE CASE

The defendant Aramis Fernandez and one Cynthia Rivera were charged with one count of conspiracy to violate the narcotics laws (21 USC 812, 841 (a) (1), 841 (b) (1) (a) and 846) by knowingly distributing and possessing with intent to distribute from November 1, 1973 until February 12, 1974 Schedule I and Schedule II narcotic drug controlled substances (5a,6a).

In addition the defendant Fernandez was charged with one substantive count of possession with intent to distribute cocaine on January 30, 1974 (21 USC 812, 841 (a) (1) and 841 (b) (1) (a), and two substantive counts of weapons' violation (18 Appen. USC 1202 (a) (1), 1202 (c) and 18 USC 921 (a) (2) (3), 924 (c). (7a-8a).

The defendant Rivera was charged with a substantive count of possession with intent to distribute cocaine on November 6, 1973.

Trial of the defendants was had before Hon. Robert J. Ward, D.J., sitting without a jury, from June 24, 1974 to June 27, 1974. Defendant Fernandez moved at the close of the governments case for a judgment of acquittal on all counts. The motion was granted as to the substantive count of carrying a weapon while committing a felony (18 USC 921 (a)

(2) (3) and 924 (c)) but was denied as to the balance of the indictment. The motion for a judgment of acquittal at the close of defendants' case was denied (333a).

The Judge found defendant Fernandez guilty of narcotics conspiracy (Count I), the substantive narcotics count (Count III) and one weapons' violation (Count IV) and sentenced defendant on each narcotic violation to cuncurrent sentence of five years plus special parole for three years and on the weapons' violation to a cuncurrent sentence of two years (358a).

The defendant is presently incarcerated at Danbury Correctional Institute. He appeals from the judgment on all counts on the grounds hereinafter argued.

In support of the conspiracy charge the government introduced testimony by an undercover agent and an informer of a buy of cocaine from defendant Rivera on November 6, 1973 at which time the defendant Fernandez was absent (27a) and of a delivery of a free sample of marijuana from defendant Rivera to the undercover agent on December 13, 1973 at which time not only was the defendant Fernandez absent but the testimony excluded Fernandez involvement in any way ((27a,24a,73a).

The key witness for the government was the undercover agent Joura who admitted that he never met defendant Fernandez prior to his arrest (27a).

As defendant Fernandez was absent at both buys the government sought to show to substantiate the conspiracy charge, that the defendant Fernandez secreted cocaine on November 26, 1974 (63a), possessed cocaine on January 30, 1974 while he was being arrested on a fugitive warrant and participated in a conspiracy involving totally unrelated conspirators in a separate and unique indictment in which he is charged as a conspirator (42a,208a).

No laboratory testimony substantiated the existence of any cocaine on November 26, 1974. The sole testimony was that of the informer that he saw a white powder (63a).

On January 30, 1974 the defendant Fernandez was arrested by the F.B.I. on a charge subsequently dismissed, totally unrelated to narcotics traffic.

The government charged that during the course of that arrest, the defendant Frenandez threw from a bedroom window an airline bag which contained a weapon, cocaine and drug paraphenelia. No evidence showed that the January 30 incident was related to the conspiracy. None

of the defendants' fingerprints were found on any item, although tested, but a latent fingerprint of an unidentified person was found. The testimony concerning the events of January 30, 1974 were strongly attacked as being impossible and beyond belief.

The government placed great emphasis upon alleged facts committed by the defendant Fernandez during the course of a separate conspiracy (a pending indictment in the Southern District - 74 Cr. 224) to support as an overt act, the conspiracy charge in the written indictment (74 Cr. 449). Defendant strenuously objected to the introduction of all testimony relating to this separate conspiracy involving different conspirators (107-8-9a, 118a, 124-5a, 142-3 180a)

The substantive narcotics possession with intent to sell (Count III) and the possession of a weapon (Count IV) arise out of the January 30, 1974 incident.

POINT I

THE INTRODUCTION INTO EVIDENCE OF PROOF OF A SEPARATE CONSPIRACY CHARGED IN A SEPARATE INDICTMENT WAS IMPROPER AND A TOTAL VARIANCE.

The indictment herein (74 Cr. 449) charges a conspiracy involving the defendant Fernandez with one Cynthia Rivera. Defendant Fernandez is also under indictment in the Southern District charged with conspiracy (involving five co-conspirators) and a substantive count of possession of narcotics with intent to sell on November 26, 1973 (74 Cr. 224), (11A, 107A, 108A). Indictment 74 Cr. 449 was a superseding indictment to 74 Cr. 139 and 74 Cr. 162 (111A). Obviously the grand Jury was familiar with the allegations of 74 Cr. 139 and 162 on the date it filed 74 Cr. 224 and was familiar with the allegations of 74 Cr. 224 on the date it filed 74 Cr. 449.

Although the grand Jury found two separate conspiracies existed - 74 Cr. 224 and 74 Cr. 449 - and the government so conceded (119A), the government at the trial below plucked an overt act (111a) charged to defendant Fernandez in the 74 Cr. 224 conspiracy and the substantive charge in that conspiracy and introduced at length testimony thereof to prove the conspiracy in 74 Cr. 449 (142A-208A). Alleged co-conspirator Cynthia Rivera is not charged in 224 even

though the grand Jury was aware of her identity at the presentment nor are any of the other conspirators charged in 224 charged in 449 even though the grand Jury was aware of their identity at the later date .

In effect the government has negated and supplanted the grand Jury which has found certain individuals involved in one conspiracy and certain in another by transposing in total the overt act of 74 Cr. 224 (111a) and implanting it in 74 Cr. 449 a different conspiracy.

Specifically 74 Cr. 224 charges as overt act No. 6:

> "On or about November 26, 1973, the defendant Jose Jauregui, also known as Aramis Fernandez, also known as Jose Torres and Pedro Luis Ansin sold approximately 116.5 grams of cocaine hydrochoride for $2,800." (107-8A).

At the trial of 74 Cr. 449 the government placed great emphasis on the above overt act of 74 Cr. 224 to prove 74 Cr. 449 and introduced three witnesses regarding same (See 142A to 208A).

Defendant Fernandez made timely lengthy and specific objection to this transposition (107A, 109A, 118A, 124A, 125A, 142A, 143A, 180A).

Defendant Fernandez was prejudiced in that (a) evidence

on one conspiracy and grand Jury found indictment (74 Cr. 224) is used to prove a separate conspiracy and grand Jury found indictment (74 Cr. 449) (b) the psychological ramifications of the transposition upon the trier of the fact (c) the government failed to disclose any matter concerning the transposed act prior to the day of testimony (12A, 13A, 125A, 126A, 127A).

In Kotteakos v. United States, 328 U.S. 750 the court stated at 774:

> "The dangers of transference of guilt from one to another across the line separating conspiracies, subconsciously or otherwise are so great that no one really can say prejudice to substantial right has not take place."

However, in Kotteakos supra, the defendants were at least charged in a single general conspiracy. In the instant case the act of one charged conspiracy is being used to prove a totally different and separate charged conspiracy involving separate conspirators!

As stated in Berger v. U.S. 295 US p. 82, 79 L.Ed. 1318 55 S.Ct. 629 :

> "The general rule that allegations and proof must correspond is based upon the obvious requirements (1) that the accused shall be definitely informed as to the charges against him, so that

> he may be enabled to prevent his surprise by the evidence offered at the trial; and (2) that he may be protected against another prosecution for the same offense."

In the instant case the defendant was not so informed and was surprised and still faces another prosecution for the same offense!

See also Daily v. United States 282 F2d 818 (9th Cir. 1960).

The preservation of the grand Jury system as the sole finder of indictments mandates reversal.

POINT II

THE COURT ERRED PERMITTING INTO EVIDENCE AN EXHIBIT UNRELATED TO ANY CHARGES AND MARRED BY A FIVE DAY BREAK IN ITS CHAIN OF CUSTODY

Exhibit 5, a small quantity of marijuana, was introduced into evidence over defendants' objection (212a).

No substantive count related to the exhibit (5a,8a).

The testimony clearly indicated that the marijuana was unrealted to any conspiracy between the co-defendants. On direct undercover agent Joura testified that co-defendant Rivera asked the agent if he was interested in grass (23a) and produced some marijuana (23a). The testimony at 24a:

"Mr. Wilson: What did you do with it ?

Agent Joura: I inspected it. I asked her if I could get 50 pounds. She told me that marijuana was something that belonged to her girl friend, that she would have to check with her girl friend, but she was sure should couls supply that kind of quantity.

The informer Ronald Roque reiterated on direct examination that the marijuana involved a girl friend and not defendant Fernandez (73a):

"Mr. Roque: Agent Bob Joura looked at it and said if he was interested he would want more than just two pounds; he would want something like 50 pounds of it. And she said she will have to talk to a girl friend of hers to see if she can get that type of weight. "

Clearly the marijuana was an independent product of the mind of co-defendant Rivera which was foreign to any common design.

Furthermore, Agent Joura admits that he did not seal the exhibit for a period of five days from December 13 to December 18, 1973 (40a,46a,49a, 50a) and that during that period at least eight to ten people had access to the substance (48a). The officer admits that the purpose of sealing evidence is to maintain its integrity (49a).

Defendant Fernandez took timely objection to the introduction of the marijuana exhibit (211a,217a,218a).

POINT III

DEFENDANT FERNANDEZ WAS NOT SHOWN TO BE A CO-CONSPIRATOR

Defendant Fernandez was not present at either the transaction of November 6 nor December 13, 1974. No evidence showed the incident of January 30, 1974 was part of the conspiracy alleged in Count I. No evidence showed that defendant Fernandez ever constructively possessed any narcotics within the scope of the conspiracy.

Each conspirator must actually or constructively possess the narcotic. U.S. v. Hysokion 448 F 2d. 343 (2nd Cir. 1971). U.S. v. Hernandez 290 F 2d 86 (2nd Cir. 1961). U.S. v. Steward 451 F 2d 1203 (2nd Cir. 1971)

It is undisputed that defendant Fernandez did not have physical possession of either November 6 or December 13 substances. In United States v. Jones 308 F 2d 26 (2nd Cir. 1962) the Second Circuit in banc stated the indicia of constructive possession: a given defendant sets the price for a batch of narcotics; had the final say as to means of delivery or was able to assure delivery.

These indicia were re-explored in U.S. v. Fibre 425 F 2d 107 (2nd Cir. 1970) cert.denied 400 U.S. 849 where

Judge Kaufman stated at 111:

> "We also have set forth several indicia of constructive possession:
>
> > 'Properly admitted evidence showing that a given defendant set the price for a batch of narcotics, had the final say as to means of transfer, or was able to assure delivery, may well be sufficient to charge the defendant with a constructive possession of the narcotics...' 308 F.2d at 31).'
>
> Since our decision in Jones, in all of the cases in which we have upheld a finding of constructive possession at least one of these indicias has been present. See, e.g. U.S. v. Lopez, 355 F.2d 250 (2nd Cir. 1960); U.S. v. Rivera, 346 F.2d 942 (2nd Cir. 1966); U.S. v. Carter, 320 F.2d 1 (2nd Cir. 1963); U.S. v. Douglas, 319 F.2d 526 (2nd Cir. 1963); U.S. v. Ramis, 315 F.2d 437 (2nd Cir. 1963)."

No evidence reveals that defendant Fernandez met any of the indicia of constructive possession.

Furthermore if the government contends that defendant Fernandez' participation in the alleged conspiracy arises out of possession on January 30, 1974, this single isolated incident (unrelated to any sale) is an insufficient basis upon which to bottom an inference of continuing participation in a conspiracy. United States. v. Reine 242 F.2d 302; United States v. Stromberg 268 F.2d 256; United States v. Aviles 274 F.2d 179; United States v. Koch 113 F.2d 982.

POINT IV

THE GOVERNMENT FAILED TO PROVE COUNTS III AND IV AS A MATTER OF LAW

Count III charges the defendant Fernandez with possession with intent to distribute a quantity of cocaine. Count IV charges the defendant with receiving, possessing and transporting in commerce and affecting commerce a firearm having previously been convincted of a felony (7a-8a).

Both counts arise from the incident and arrest of January 30, 1974.

The acts of the F.B.I. on January 30, 1974 were unconscionable and should result in a dismissal of the indictment.

Agent Beardsley testified that he arrived at 1410 Morris Avenue, Bronx, and went to apartment 5D where he announced to the occupants that he has a warrant (228a). He was then told to slide the warrant under door (228a). He then states that unless the door is opened he would break the door down (228a). Agent Beardsley then summarily uses a wrenching bar to break open the door. It is approximately 7:30 A.M. He has no warrant (231a-232a). This unconscionable act precipitates what the government contends are the violations stated in Counts III and IV.

Agent Pritt testified that he saw an individual lean from the fifty (?) floor of the building (245a) and threw a red bag to the sidewalk. Approximately five minutes after being notified that the agents were "hitting the apartment" (245a). Then one or two minutes later more items are allegedly thrown from the window (246a).

However, agent Beardsly testified that after hitting the door three or four times, it was opened from the inside and defendant Fernandez was standing there (228a). Clearly the three or four blows could not have taken the time agent Pritt states (a total of six to seven minutes).

Agent Pritt's testimony is crucial to the government's case as agent Pritt states that he observed defendant Fernandez throw a red American Flyers bag containing the items alleged in Counts III and IV from a window. Yet agent Pritt does not even know if the first floor is street level or if there are stores (259a - 260a). He testified that he was looking up the building at no floor in particular; there are hundreds of windows in this large apartment house, but yet he sees the defendant (264a-261a)

Agent Pritt admits that the bag and its contents were tested for fingerprints. The government contends

that the only fingerprint found was not that of the defendant Fernandez (277-8a, 287a). The fingerprint report is introduced as defendants' exhibit (282a). The government contends that the fact no fingerprints of defendant Fernandex exist indicates that they were wiped off (276a). This rationale is totally illogical as it implies that defendant Fernandex ran about an apartment scooping up the exhibits, wiping them, placing them within bags and tossing them out of the window all within three to four blows of a sledge hammer and then opening the door, and at the same time leaving one third party print. Further testimony of agent Pritt elucidates that he doesn't recall if defendant wore glasses when he looked out the window (291a).

No evidence was introduced to show that defendant Fernandez knew the contents of the red American Flyers Bag.

It is significant that defendant Fernandez asked the court for an occular inspection which was refused (256a, 292a, 303a, 330a) Defendant Fernandex explained to the court the uniqueness of the room (230a-231a). Yet agent Beardsly cannot recall the room at all (315a, 322a, 327a).

The cumulative effect of the incredible testimony of the agents, the lack of defendants' fingerprints; the existence of a third party fingerprints; the improbability of the alleged circumstances when combined with the unconscionable acts of the agents warrants a reversal.

CONCLUSION

In view of the improper variance by the admission into evidence of proof of a separate conspiracy, the introduction of the unrelated marijuana exhibit, the failure to show conspiracy and the incredibility of evidence relating to Counts III and IV, it is respectfully submitted that the judgment of conviction be reversed.

Respectfully,

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(CJA) Attorney for Appellant

October 13, 1974